Supreme Court, U. S.
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NO. 80-512

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

BALTIMORE COUNTY, MARYLAND,
Petitioner,

v.

RAYMOND INTERNATIONAL BUILDERS, INC.
and
J. E. GREINER, INC.,
Respondents.

REPLY BRIEF OF PETITIONER IN RE: PETITION FOR WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Baltimore County, Maryland, the Petitioner herein, heretofore filed a Petition for Writ of Certiorari to the Court of Special Appeals of Maryland, and a Brief in opposition to such petition was heretofore filed by Raymond International Builders, Inc. The Petitioner believes that certain misleading and erroneous averments and arguments were made by such Respondent which need a reply. Therefore, the Petitioner is responding briefly herein pertaining to such averments and arguments.

Your Petitioner will deal with the questions actually presented by the said Raymond International Builders, Inc. (hereinafter referred to as Appellee) and will repeat such questions below for easy reference by this Honorable Court.

QUESTIONS PRESENTED

1. Is any important federal question raised by the holding of the Court of Special Appeals of Maryland that under established principles of state law as applied to the facts, the trial court was clearly erroneous in refusing to allow Respondent, Raymond International Builders, Inc., to recover damages resulting from misleading and inaccurate information supplied by Petitioner in connection with a contract between Respondent and Petitioner?

2. Since the defenses of sovereign immunity and statute of limitations were neither raised nor preserved by the Petitioner in the Court of Special Appeals, should Petitioner be entitled by claiming lack of due process to have them reviewed by this Court?

3. Is the decision of the Court of Special Appeals a final judgment for the purposes of Title 28 U.S.C.A. Section 1257 in light of the fact that the case was remanded for a determination of damages?

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STATEMENT OF THE CASE

Your Petitioner will not repeat herein the facts alleged in the Statement of the Case heretofore set forth in the Petition for Writ of Certiorari to the Court of Special Appeals of Maryland previously filed in this Honorable Court. However, the Petitioner will reflect upon what it believes to be misleading and erroneous statements in the Brief of the Appellee.

The Appellee has alleged that the plans and specifications referred to in this proceeding showed a strong, level tremie (the footing of the pier) requiring no substantial preparatory work prior to the placement of the forms for the concrete. However, this allegation by the Appellee is incorrect in view of the fact that the testimony before the Trial Court showed a complete conflict on the factual issue of the tremie as it existed on any plans and specifications. The Trial Court's conclusion did not reveal any finding of a strong, level tremie.

The Appellee further alleges that the plans expressly specify that two hundred and thirty yards of preplaced aggregate were to be used. However, the documents clearly indicated that the reference to two hundred and thirty cubic yards was an approximate reference and not absolute as alleged by the Appellee.

Additionally, the Appellee alleges in its Statement of the Case that after the repairs began, Respondent discovered that the plans and specifications were materially wrong and were substantially inaccurate. However, there was a complete conflict in the testimony before the Trial Court on this issue and the Trial Court did not find or determine that the plans and specifications were materially wrong or were substantially inaccurate.

The Appellee further alleges in its Statement of the Case that the underwater conditions were unforeseeable. However, the testimony was in complete conflict on this issue and the Trial Court did not find that such underwater conditions were unforeseeable. Also there was much testimony concerning the lack of skill and competence of the subcontractors of the Appellee which caused difficulties to the work being performed by the Appellee.

The Appellee further alleges that it only utilized 124.78 cubic yards, but the testimony did not reflect any such absolute figure concerning the aggregate concrete used by the Appellee.

Although the Appellee continues to allege that representations made to it were inaccurate, there was no such finding of fact before the Trial Court.

In essence, there was a long trial containing disputed facts and evidence which resulted in the Trial Court's decision in favor of the Petitioner herein. The determination of the Court of Special Appeals of Maryland seems to make a complete factual determination in the case without the benefit of listening to the witnesses and without the benefit of the direct contact with the case as was presented to the Trial Court.

REASONS FOR GRANTING THE WRIT

Your Petitioner will not repeat herein the reasons given in its Petition for Writ of Certiorari previously filed in this proceeding, but your Petitioner desires to reflect upon the argument made by the Appellee to its questions presented.

On page eight of the Brief of the Appellee, the Appellee argues that the Appellate Court clearly made its determination of the issues in the case based upon state law and not upon *Hollerbach v. United States*, 233 U.S. 165 (1914). However, on page eight of the opinion of the Court of Special Appeals, the drafter of said Opinion stated as follows:

> "The seminal case on the subject is *Hollerbach v. United States*, 233 U.S. 165, 34 S.Ct. 553, 58 L.Ed. 898, which was decided by the Supreme Court in 1914."

Although the said Court of Special Appeals of Maryland did discuss other Maryland cases, these Maryland cases fell back upon *Hollerbach*. For example, the Court of Special Appeals referred to the case of *Trionfo v. Board of Education of Harford County*, 41 Md. App. 103, 395 A.2d 1207 (1979). In *Trionfo*, the Court of Special Appeals relied upon *Hollerbach*, but found no right to rely because the test borings furnished to

contract bidders were supplied only in exchange for a written release from the bidders which release was designed to absolve the board from any responsibility for the accuracy or completeness of the information and to protect the board from assessments for additional work performed pursuant to assumptions made from the supply data. In effect, the Court of Special Appeals was saying that the application of *Hollerbach* was absolute in that any data submitted could place the governmental agency fully responsible unless a release is actually executed relating to the data supply.

It is hard to believe that the state of the law relating to *Hollerbach* is that a municipal, or governmental agency, would have to obtain a specific release if it gave any information to a bidder even if (as in the case at bar) the information was over forty years old and clear warnings were given to the bidder that the information should not be used with reliance. Therefore, on the issue of whether or not an important federal question exists, we respectfully submit that there is a definite need for this Honorable Court to clarify the *Hollerbach* decision in view of the other Supreme Court decisions referred to in the original Petition filed herein, and in order to protect the municipal governments from the hard line taken by the Maryland Court of Special Appeals in the case at bar and in the *Trionfo* case where practically absolute liability exists for overruns. We believe that the Supreme Court never intended that *Hollerbach* would be applied to this extent.

In connection with the second question raised by the Appellee that the defenses of sovereign immunity and statute of limitations were neither raised nor preserved by the Petitioner in the Court of Special Appeals, your Petitioner will refer to specific sections in its Brief before the Court of Special Appeals which clearly indicate that such issues were presented in its Brief. Additionally, such issues were presented before the Trial Court and in oral argument before the Court of Special Appeals of Maryland.

On page eight of the Petitioner's Brief before the Court of Special Appeals, your Petitioner clearly discussed the defenses of sovereign immunity. In addition, on page nine of said Brief, your Petitioner discussed the application of the statute of limitations to the claims of the Appellee herein. The following is a quote from the aforesaid page eight of your Petitioner's aforesaid Brief:

> "Also, the theory of sovereign immunity applied to contracts until July 1, 1976 when Article 25A, Section 1A, abrogated a chartered county's use of the defense of sovereign immunity in contract actions (Chapter 450 of the Laws of Maryland, 1976).
>
> "The County further defended in the case at bar under the theory of sovereign immunity against the contract claims of the Appellant in view of the fact that such contract claims originated prior to July 1, 1976."

The following is a direct quote from page 9 of your Petitioner's Brief aforesaid:

> "Another technical defense raised by the County in this proceeding was the doctrine of the Statute of Limitations in view of the fact that the testimony clearly indicated that the Appellant knew about the underwater conditions in September of 1972, but did not file any action until 1976. The contract documents in question were not under seal, and any claims against the County should have measured from September of 1972 and would have expired three years thereafter."

Responding to the third question presented by the Appellee herein, your Petitioner alleges that the issues relating to the Appellee, Greiner Engineering Sciences, Inc. (which did not file any brief herein), and the issues relating to sovereign immunity

and the statute of limitations are completely final in nature. In addition, the seriousness of the application of the *Hollerbach* case, and the broad implications from such construction which shall affect municipal and state contracts throughout the country should require a review by this Honorable Court.

Many of the public works agreements executed by state and local governments involve federal funds so that there is broad national interest in the issues outlined herein. A clarification by this Honorable Court would go far in clearing up the question of the application of *Hollerbach* in state courts and would remove the great fear that now exists in supplying any information to bidders in public works contracts.

CONCLUSION

For all the reasons cited herein and in the Petition for Writ of Certiorari previously filed, we respectfully request that this Honorable Court grant the Writ of Certiorari requested.

Respectfully submitted,

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